

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARY B. MILLER)	
Claimant)	
VS.)	
)	
MILLER'S INC.)	Docket No. 193,545
Respondent)	
AND)	
)	
FARMERS ALLIANCE INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

On November 13, 1996, the application of the respondent for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge John D. Clark on May 23, 1996, came on for oral argument in Wichita, Kansas. As Appeals Board member Kenton Wirth has recused himself from this matter, Mr. Jeffery K. Cooper has been appointed to act as Appeals Board Member Pro Tem.

APPEARANCES

Claimant appeared by and through her attorney, E. L. Lee Kinch of Wichita, Kansas. Respondent and its insurance carrier appeared by and through their attorney, Christopher J. McCurdy of Wichita, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

- (1) Whether claimant suffered accidental injury arising out of and in the course of her employment on December 3, 1991, to her right hip, September 2, 1993, to her left hip, and April 19, 1995, to her pelvis.
- (2) The nature and extent of claimant's injury and/or disability.
- (3) Claimant's entitlement to outstanding medical both unauthorized and future.
- (4) Claimant's average weekly wage on the dates of injury.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, and in addition the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

The Appeals Board finds that the Order of the Administrative Law Judge sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The findings and conclusions enumerated in the Order of the Administrative Law Judge are both accurate and appropriate and the Appeals Board adopts the same as its own findings and conclusions as if specifically set forth herein as to the issues raised.

The Administrative Law Judge in awarding claimant permanent total disability compensation considered the medical evidence of Drs. Mills and Murphy as significant. The Appeals Board concurs with the analysis of the Administrative Law Judge. The respondent objects, alleging that claimant did not suffer accidental injury on the dates alleged. It is conceded that claimant's December 3, 1991, injury occurred at work and respondent does not dispute this finding. The respondent does dispute the fact that the September 2, 1993, injury to claimant's left hip arose out of and in the course of her employment. The evidence indicates that claimant, while using a walker necessitated by the original December 1991 injury, fell over the door of a dishwasher breaking her left hip. The evidence is significant in tying the left hip injury to the original right hip injury and the Appeals Board concurs with the Administrative Law Judge's award of benefits for same. The injury on April 19, 1995, was found to be not compensable. The claimant's lack of explanation for the fall and her inability to remember the circumstances surrounding the fall were defeating to her claim.

Respondent then contended claimant's work disability and inability to return to employment resulted from the April 1995 injury rather than the two prior hip injuries. This argument is defeated by the medical evidence presented by Dr. Philip Mills. Dr. Mills who examined claimant April 5, 1995, two weeks prior to the last injury, felt that claimant was in need of an assisted living facility at that time. He had concern regarding the several

prior falls suffered by claimant, claimant's frailty and age and her problem in hearing. He felt a prescription for Lifeline would be appropriate and opined that assisted living was necessitated by her bilateral hip fractures. As such the Appeals Board finds the Administrative Law Judge's award of benefits resulting from the hip injuries, regardless of the injury suffered April 19, 1995, to be appropriate and said finding is affirmed.

Respondent's additional argument that claimant is physically capable of performing sedentary labor was considered by the Appeals Board. It was found, however, that an 83-year-old woman suffering from bilateral hip fractures, requiring the use of a walker whenever she ambulated, who had not worked since 1991, and who required daily assistance just to fix her meals, was not likely to find work in the open labor market even at the sedentary level.

The medical evidence dealing with claimant's functional impairment of 32 percent to the body as a whole is appropriate and the Appeals Board adopts the findings of the Administrative Law Judge in this regard as though specifically set forth herein.

In considering the average weekly wage of the claimant the Appeals Board finds the evidence is sufficient to award claimant an average weekly wage of \$100 per week. Respondent's contention that claimant has failed to prove her entitlement to benefits as a result of the additional compensation stemming from claimant's health insurance is supported by the evidence. The information provided by claimant does not differentiate between health insurance provided for claimant and health insurance provided for her husband. It also fails to specify what, if any, health insurance claimant was receiving at the time of her injury. In Workers Compensation matters it is claimant's burden to prove her entitlement to the benefits including the right to include additional compensation in the average weekly wage. The Appeals Board finds the Administrative Law Judge's denial of this portion of claimant's average weekly wage is appropriate and affirms same.

The Appeals Board further finds claimant to be entitled to all outstanding medical expenses incurred as a result of the injuries suffered December 3, 1991, and September 2, 1993. Per the Award of the Administrative Law Judge this includes the bills of Dr. Murphy, HCA Wesley, Dr. Mills, and Dr. Veenis. It further includes the bills at the Sterling House Facility, Professional Home Health Care Aids, and reimbursement to claimant's daughter for the modification costs for the handicapped facility at her home. The Appeals Board finds the modification costs created by claimant's daughter, in all likelihood, resulted in savings to the respondent as the facility at Sterling House would have been significantly more expensive over a several year period than the cost of the modification of claimant's daughter's home. The Appeals Board, affirms the Administrative Law Judge in not ordering reimbursement to claimant's family for their services, but does echo the sentiments of the Administrative Law Judge in this regard.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge John D. Clark dated May 23, 1996, should be, and is hereby affirmed in all respects and an award is granted in favor of the claimant, Mary B. Miller, and against respondent, Miller's Inc., and its insurance carrier, Farmers Alliance Insurance Company, for accidental injury sustained on December 3, 1991, and September 2, 1993.

Claimant is entitled to 153.12 weeks temporary total disability compensation at the rate of \$66.67 per week in the amount of \$10,208.84 followed by 1,721.78 weeks permanent total disability compensation at the rate of \$66.67 per week totaling \$114,791.16 for a 100% permanent total disability making a total award of \$125,000.

As of November 15, 1996, there is due and owing claimant 153.12 weeks of temporary total disability compensation at the rate of \$66.67 per week or \$10,208.84, followed by 105.31 weeks of permanent total disability at the rate of \$66.67 per week in the sum of \$7,031.02 for a total of \$17,229.86, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$107,770.14 is to be paid for 1,616.47 weeks at the rate of \$66.67 per week, until fully paid or further order of the Director.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent to be paid as follows:

Barber & Associates

Deposition of Philip Roderick Mills, M.D.	\$251.50
Transcript of preliminary hearing	\$253.80
Deposition of James Molski	\$178.00
Deposition of Philip R. Mills, M.D.	\$168.40
Deposition of Cheryl Pelaccio	\$249.40
Deposition of Carol P. Fielding	\$135.20
Deposition of Blake C. Veenis, M.D.	\$153.20

Ireland Court Reporting, inc.

Transcript of regular hearing	\$271.20
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Court Reporting Service

Transcript of continuation of regular hearing	\$unknown
Deposition of Roger Miller	\$unknown
Deposition of Marlys A. K. Marshall	\$unknown
Deposition of Robert Eyster, M.D.	\$unknown
Deposition of Mary J. Boger	\$unknown
Deposition of Duane Murphy, M.D.	\$unknown

IT IS SO ORDERED.

Dated this ____ day of December 1996.

BOARD MEMBER PRO TEM

BOARD MEMBER

BOARD MEMBER

c: E. L. Lee Kinch, Wichita, KS
Christopher J. McCurdy, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director